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09/751,397	01/02/2001	Lori Ann Wilson	67,500-353	7520
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HOWARD & HOWARD ATTORNEYS, P.C. THE PINEHURST OFFICE CENTER, SUITE #101 39400 WOODWARD AVENUE BLOOMFIELD HILLS, MI 48304-5151				TRAN LIEN, THUY
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/751,397

Filing Date: January 02, 2001

Appellant(s): WILSON ET AL.

Randy Shoemaker
For Appellant

EXAMINER'S ANSWER

MAILED
APR 28 2006
GROUP 1700

This is in response to the appeal brief filed Feb. 13, 2006 appealing from the Office
action mailed 6/15/2005.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

(3) Status of Claims

The statement of the status of claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

Claims 1-3, 6,8-12, 34-35 have been finally rejected and are the subject of this appeal. Appellant's statement concerning claim 6 is not correct. The omission of claim 6 in the rejection statement in the final office action was a typographical error. Claim 6 was not indicated to be allowable or was not objected to. The final rejection maintained the rejection of all claims from the office action mailed on 9/23/04; in that office action, claim 6 was rejected. The limitation of claim 6 concerning the allele was addressed in both the office action mailed on 9/23/04 and the final rejection mailed on 6/15/2005.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct. The minor correction is that claim 6 is also included in the 103 rejection.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

2,526,792 **Alderman** **10-1950**

Nakamura et al, "Production of Waxy Wheats" Molecular Gene Genetic,

248, (1995), pp. 253-259.

Y. Pomeranz, "Wheat Chemistry and Technology" (1988), pp. 10, 16-17.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all

obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

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Claims 1-3, 6, 8-12, 34-35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Alderman in view of Nakamura et al (Production of waxy (amylose free) wheats) and the book " Wheat Chemistry and Technology).

Alderman discloses cooked- puffed waxy cereal food. The grains used are waxy varieties of the cereal grains such as corn, rice, sorghum, barley, millet etc... The whole grain may be processed in the form of whole kernels or fractions thereof such as grits. The grains are cooked and then oven puffed. The grains are formed into ready-to-eat cereal foods of the breakfast cereal type. The grains can be pearled. (See entire reference)

Alderman does not disclose the grain is waxy wheat and coating the grains with an edible coating.

Nakamura et al disclose the production of waxy wheats. (See abstract)

The book shows that the common wheat " Triticum aestivum" include both soft and hard wheat and the protein content of the soft and hard wheat ranges from 9-15%.

It would have been obvious to one skilled in the art at the time of the invention to use any waxy grains that are available. Nakamura et al show that waxy wheats are known. Thus, it would have been obvious to use waxy wheat to produce the waxy cooked cereal grains disclosed by Alderman. When waxy wheat is used, it is obvious the grains will have the allele and the amylose content claimed. Nakamura et al do not disclose the protein content of the wheat; however, they disclose common wheat is used. Common wheat includes both the soft and hard kind; as shown by the textbook, the protein ranges from 9-15%. Thus, the protein claimed is commonly found in wheat

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and would be expected to find in the wheat product of Nakamura et al because the making of the waxy variety does not alter the protein content. Furthermore, the specification does not disclose any step to alter the protein content of the wheat product; thus, the protein content is that commonly found in wheat product. It would have been obvious to put an edible coating such as sucrose, corn syrup solid on the grains to enhance the taste and flavor of the grains. This is well known in the cereal technology. Since the cereal product is puffed and it is a ready to eat cereal, the product is buoyant because cereal floats in liquid. The Alderman product is dried; it is made of cereal grain and it is the same type of product as claimed. Thus, it is obvious the product has the same storage stability as claimed. Alderman does not disclose adding additive to inhibit development of rancidity.

Claims 34-35 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 34-35 are vague and indefinite because they depend from claims that have been withdrawn; thus, it is not clear what is intended.

(10) Response to Argument

On page 9 of the appeal brief, appellant argues the product disclosed in Alderman and the process utilized by Alderman does not produce the product as claimed in claim 1. Appellant relies on the data provided in the 132 declaration by Lori Wilson. On pages 10-11 of the appeal brief, appellant describes and gives the results shown in the declaration. Since appellant relies exclusively on the declaration to

support the argument, the declaration is hereby addressed in response to the argument presented by appellant. Page 2 of the declaration describes how the waxy grains are processed in accordance with the teaching of Alderman and the method as disclosed in the instant application. Page 3 of the declaration states that the measure of the amount of fiber is a measure of whether each is a whole grain waxy wheat. It is stated that the product of Alderman has an insoluble fiber level of 6.29 %, total fiber of 9.99 % versus the claimed product of insoluble fiber level of 10.14, total fiber of 13.56%. The showing in the declaration is not persuasive. Alderman teaches using whole grain (see col. 2 line 55). It is not known how the fiber level is measured for the two products. The claims require that the grains be whole grain and this is what is taught in Alderman. The declaration does not establish any correlation between the level of fiber and the characteristic of the grain being whole. There is no evidence showing that at fiber level of 9.99%, the grain ceases to be whole. Appellant states on page 12 of the appeal brief that whole kernel has a very specific definition in the industry in that it contains all three portions which are the outer bran, the endosperm and the germ. Soluble and insoluble fiber are found in the outer layer. The fact that the grains processed in accordance with the Alderman teaching have insoluble fiber and total fiber is indicative that the outer layer is still present. The declaration does not say anything about the endosperm and the germ which mean they are still present. Thus, the showing in the declaration demonstrates that the grain processed according on the Alderman method is whole grain. The claims do not recite certain degree of wholeness; as long as the grains still possess the three main portions, they are whole grain. While there might be a

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difference in the fiber content, the amount of fiber is not claimed; thus, it is not an issue to be considered.

On pages 12-13 of the appeal brief, appellant argues the product of Alderman is not gelatinized throughout as shown by the measurements of water solubility, alkali solubility and rapid viscosity in the declaration. The showing in the declaration is not persuasive because it fails to establish a relationship between the parameters measured and gelatinization. While the declaration states the degree of gelatinization can be measured by these measurements, there is no showing of correlation between the measurements and the degree of gelatinization. For example, there is no showing that at a water solubility of 18%, the grains are not gelatinized throughout or that the grains are not gelatinized when the viscosity is at 107. While the declaration might show differences in measurement of some properties between the claimed product and the product processed according to Alderman, these measurements are not claimed; thus, they are not limitation to be considered. Alderman discloses the grains are processed are used to make puffed ready-to-eat cereal foods of the breakfast cereal type. Thus, the grains are inherently gelatinized throughout in order to be a ready-to-eat product. Furthermore, the grains are cooked for a longer period of time than the grains of the claimed product as described in paragraph 7. Also, the declaration does not show the conditions of measurement of the two products; thus, it is not known how the parameters are measured for the two products. There is no showing of how the testing is done. Also, the declaration only shows 1 example of each. Such small number of testing is not sufficient to make a general conclusion because errors in

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measurement can lead to different result and there is no data to reach the conclusion that the numbers will be the same in repeated trials.

Page 4 of the declaration shows that the Alderman product has different headspace hexanal form the claimed product; thus, the product does not have the storage stability claimed. The showing is not commensurate in scope with the claims because there is no showing of stability of at least 6 months as claimed. The declaration states a headspace hexanal levels greater than 5ppm are considered to represent clear rancidity. However, the declaration shows that at 4 months, the Alderman product has 1ppm hexanal which is no where closed to 5ppm. The claims do not recite the storage condition of the product; there is no data for six months. The Alderman product is dried; it is made of cereal grain and it is the same type of product as claimed. Thus, it is obvious the product has the same storage stability as claimed and the showing in the declaration is not sufficient to dispute this. While there is a difference in the hexanal amounts, such parameter is not claimed; thus, it is not an issue under consideration. Also, the testing has the same problem as the testing done for the determination of gelatinization. The number of sample ran is too small to enable one to reach a conclusion that the same end result will be obtained in subsequent trials. As cited on page 2 of the declaration, the steaming process serves to inactivate the lipases which are believed to make cooked whole grain waxy wheat unstable and subject to rancidity. The grains are steamed for a longer period of time in the Alderman process. Thus, the lipases are inactivated and this cooking gives the product at least the storage stability claimed.

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On page 16 on the appeal brief, appellant argues claims 34 and 35 claim a product that is definite. It is not questioned that the claims recite a definite product. However, the claims are not independent claims and are depended from claims that have been withdrawn. Thus, it is not clear what is intended.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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